IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 18, 2006 Session

CHARLES McRAE, ET AL. v. C.L. HAGAMAN, JR., ET AL.

Appeal from the Chancery Court for Anderson County
No. 97CH5741 William E. Lantrip, Chancellor

No. E2005-01470-COA-R3-CV - FILED AUGUST 22, 2006

This action arises from a sale of real estate. After the sale was completed, the buyers, Charles and Joanna McRae, discovered that a 1.533-acre portion of the property they thought was part of the sale was not included. The McRaes filed this lawsuit against C.L. Hagaman (the seller) and W. Howard Henegar (the real estate broker), alleging that they negligently misrepresented that the disputed tract was part of the sale. After the trial court entered judgment against Mr. Henegar, he appealed. On the first appeal, this Court found substantial evidence of negligence on Mr. McRae's part, and remanded with instructions to the trial court to apply the principles of comparative negligence. On remand, the trial court found Mr. McRae to be 25% at fault and Mr. Henegar 75% at fault. Mr. Henegar again appeals, arguing that the trial court should have held Mr. McRae's fault to be at least equal to his own, and thereby should have dismissed the action. We hold that the evidence does not preponderate against the trial court's determination that Mr. Henegar was 75% at fault in negligently misrepresenting that the disputed tract was included in the sale, and therefore we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Jon G. Roach and Hanson R. Tipton, Knoxville, Tennessee, for the Appellant, W. Howard Henegar.

W.F. Shumate, Jr., Knoxville, Tennessee, for the Appellees, Charles and Joanna McRae.

OPINION

I. Background

On the first appeal of this case, we instructed the trial court to apply the principles of comparative negligence as mandated by *McIntyre v. Ballentine*, 833 S.W.2d 52 (Tenn. 1992), in comparing the relative fault of Mr. McRae and Mr. Henegar. *See McRae v. Hagaman*, No. E2004-00852-COA-R3-CV, 2004 WL 2378109 (Tenn. Ct. App. E.S., Oct. 25, 2004) ("*McRae* I"). On remand, the trial court did not hear any additional proof, but considered the parties' briefs in light of this mandate. Because the evidence has remained unchanged since our decision in *McRae* I, we have quoted liberally from that opinion in the following recitation of the factual background of this case.

Mr. Hagaman, the owner of Norris lakeside property, listed it for sale with the Henegar Realty Company, who contacted the McRaes to ascertain their interest in purchasing the property, which consisted of "approximately 37 acres, excluding the lot retained by Hagaman adjacent to Steve Sumner." Mr. Hagaman, Mr. and Mrs. McRae, Palmer McRae (Mr. McRae's father), Mr. Henegar and his partner Robert McKamey looked at the property in July of 1996. During the property showing, Mr. Hagaman pointed eastwardly and stated that he was keeping a portion of the property for his daughter. Mr. Hagaman did not elaborate upon the size or exact location of the portion he intended to retain. The McRaes agreed to purchase the property for the listed price of $500,000.

Mr. Hagaman employed a surveyor who surveyed and prepared a plat of the property, which was dated August 5, 1996. Mr. Hagaman reviewed the plat, identified the tracts he had contracted to sell with a circle, and delivered a copy of the plat to Mr. Henegar's office for further delivery to Mr. McRae. The lakefront tract, identified as Tract 5 and containing 1.533 acres, was not circled. Its non-inclusion is the core of this controversy.

At that time, both Mr. McRae and Mr. Henegar were in California for personal and unrelated business. Mr. Henegar's partner faxed the plat to Mr. Henegar, who delivered it to Mr. McRae. Mr. Henegar testified that he told Mr. McRae that they "were getting the tracts circled on the plat" – Tracts 1, 2, 3, and 4. Mr. McRae testified that Mr. Henegar said "they were getting everything shown on the plat," and that the significance of the circles was not discussed. The plat identified 5 tracts-Tract 1 (26.748 acres); Tract 2 (0.861 acres); Tract 3 (0.443 acres); Tract 4 (1.468 acres); and Tract 5 (1.533 acres). Only Tract 5 was not circled on the plat. The total acreage shown on the plat was less than the minimum of 34.5 acres contractually required. This diminution was expressly waived by Mr. McRae, who made no further inquiries.

Mr. McRae was also furnished a copy of the proposed warranty deed, which described the four tracts included in the proposed sale, together with a three-quarter acre and a two-acre tract involving a right of reverter. The acreage of each tract of land was shown in the proposed deed, in addition to a metes and bounds description. Tract 5 was not included in the deed.

The surveyor updated his August 5, 1996 plat with a plat dated August 27, 1996. The only difference in the two plats, other than the date, was that the tract identified as "Tract 5" on the first plat was identified as "Hagaman" on the second plat. The change in labeling of the tract from "Tract 5" to "Hagaman" was done by the surveyor, as instructed by Mr. Hagaman. Although Mr. Henegar's office had possession of the August 27, 1996 plat that changed "Tract 5" to "Hagaman," Mr. Henegar did not deliver that plat to Mr. McRae, and the McRaes did not see it before closing.

The transaction closed on September 13, 1996. The deed description in the proposed deed furnished to Mr. McRae before closing was the same as the deed description in the executed deed. The McRaes, who were still in California, had signed the closing documents and forwarded them by mail. After the sale was closed, the McRaes became aware that Tract 5, which they had thought was included in the sale, in fact was not included in the property description in their warranty deed. The McRaes filed this action against Mr. Hagaman and Mr. Henegar, alleging, among other things, that they had misrepresented that Tract 5 was included in the sale. The trial court granted Mr. Hagaman summary judgment, and that judgment was not appealed and has become final. The case proceeded to trial against Mr. Henegar, as agent for the seller, Mr. Hagaman.

The trial court found that Mr. McRae and Mr. Henegar "were operating under the assumption that Tract 5 was included." The trial court further found that both Mr. Henegar and Mr. McRae were misled by the first survey, and that Mr. Henegar negligently represented that Tract 5 was included in the conveyance because of his statement to Mr. McRae that all of the tracts were to be sold. The trial court found that Mr. Henegar's misrepresentations were not intentional or fraudulent, but found him guilty of negligence, and entered a judgment against him for damages in the amount of $126,000.

Mr. Henegar appealed the trial court's judgment, arguing, among other things, that Mr. McRae was negligent and that the trial court should have applied the principles of comparative fault in deciding the case. In *McRae* I, this court agreed, finding substantial evidence of negligence on the part of Mr. McRae in addition to evidence of Mr. Henegar's negligence, and stating:

> While we cannot find that the evidence preponderates against the finding of negligence on the part of Henegar, we find, as hereafter stated, that the negligence of McRae clearly contributed as a legal cause to the non-inclusion of Tract 5 in the conveyance.
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> We have determined that the negligence of McRae contributed as a legal cause to his damages. Hence, Henegar is liable only for the percentage of the plaintiffs' damages occasioned by Henegar's negligence. *McIntyre* [*v. Ballentine,* 833 S.W.2d 52 (Tenn. 1992)] at

> 58. The judgment is vacated and the case is remanded for appropriate findings consistent with the mandate of *McIntyre.*

McRae I, 2004 WL 2378109 at *6, 8.

As already noted, on remand the trial court heard no further proof, but considered the briefs filed by the parties and reviewed the evidence in the record in light of the *McRae* I mandate. The trial court held Mr. McRae to be 25% at fault and Mr. Henegar to be 75% at fault, and entered judgment against Mr. Henegar in the amount of $126,000 (the undisputed amount of damages) less 25%, for a final judgment in amount of $94,500. Mr. Henegar has appealed the trial court's judgment a second time.

II. Issue Presented

The issue we address in this case is whether the trial court erred in its apportionment of fault in the amount of 25% to Mr. McRae and 75% to Mr. Henegar.

III. Standard of Review

This non-jury case is subject to our *de novo* review upon the record of the proceedings below. Tenn. R. App. P. 13(d) mandates that there is a presumption that the trial court's findings of fact are correct, and we must honor that presumption unless the evidence preponderates to the contrary. *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993). There is no presumption as to the correctness of the trial court's conclusions of law. *See Campbell v. Florida Steel Corp.,* 919 S.W.2d 26, 35 (Tenn. 1996). As this is a case involving comparative fault, it is important to note that the assessment of the parties' relative fault is one of fact, carrying the aforementioned presumption of correctness. *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995); *Keaton v. Hancock Co. Bd. of Educ.*, 119 S.W.3d 218, 222-23 (Tenn. Ct. App. 2003). Our *de novo* review is subject to the well-established principle that the trial court, having seen and heard the witnesses testify, is in the best position to judge their credibility. *See Bowman v. Bowman,* 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991). Great deference must be shown to the trial court's credibility determinations. *Id.; Keaton,* 119 S.W.3d at 223. While the trier of fact has considerable latitude in allocating percentages of fault, appellate courts have the power to reallocate fault when the evidence preponderates against the trial court's fault-finding. *Keaton,* 119 S.W.2d at 225 (citing *Wright,* 898 S.W.2d at 181 and *Cross v. City of Memphis,* 20 S.W.3d 642 (Tenn. 2000)).

IV. Analysis

In *McRae* I, this Court found that while the evidence did not preponderate against the trial court's finding that Henegar was negligent in misrepresenting that the disputed tract was to be included in the sale, Mr. McRae was also guilty of some negligence in the transaction. The evidence supporting Mr. McRae's fault was summarized by the *McRae* I court as follows:

> McRae understood-was firmly on notice of the fact-that a portion of the property would not be sold. He therefore had a duty in consideration of all the circumstances, to determine the precise location of the exempted portion. The August 5, 1996 plat was delivered by McRae with certain tracts identified by a circle. Both Hagaman and Henegar testified that only "circled tracts" were being sold. McRae disputes that he was told about the circled lots, but at the least he had a duty to [i]nquire about the significance of the circles... McRae never compared the plat to the deed. Had he done so, the non-inclusion of the disputed tract would have been evident.

McRae I, 2004 WL 2378109 at *7 (footnote omitted).

Our review of the record finds substantial evidence that Mr. Henegar was also guilty of negligence in misrepresenting to the McRaes that the disputed tract was included in the sale. We note that the trial court found Mr. Henegar innocent of fraud or intentional misrepresentation; but we also find that the evidence does not preponderate against the trial court's assignment of 75% fault to Mr. Henegar under the circumstances of this case.

As we stated in *McRae* I, it is a "well-nigh truistic legal principle that a real estate agent for a seller has a duty to use reasonable care in determining that all representations made are true." *Id.* at *5. Before a seller makes a representation, he or she is required to exercise reasonable care to make sure it is correct. *Staggs v. Sells*, 86 S.W.3d 219, 223 (Tenn. Ct. App. 2001)(quoting *Akbari v. Horn*, 641 S.W.2d 506, 508 (Tenn. Ct. App. 1982)). The *Staggs* court recognized that both a buyer and an agent for the seller can be held liable for a portion of fault in a negligent misrepresentation case:

> It is axiomatic that a plaintiff could commit negligence which might have contributed to the amount of damage suffered, but still have justifiably relied on the defendants' representations. Justifiable reliance is one of the elements that must be established to the satisfaction of the trial judge by a preponderance of the evidence before the tort of negligent misrepresentation can be established by a plaintiff. Such a finding is not inconsistent with comparative fault on the part of the plaintiff.

Staggs, 86 S.W.3d at 224.

Both Mr. McRae and his father, Palmer McRae, testified that Mr. Henegar told them that the sale included all of the land shown on the August 5, 1996 plat, which included Tract 5. Although Mr. Henegar disputed this assertion, the trial court obviously credited the McRaes' testimony on this point. There was further testimony in the record that after the sale was completed, Mr. Henegar on at least one occasion made a statement to the effect that there had been a mistake and that Tract 5 should have been included in the sale. Mr. Henegar declined to deny that he made such a statement when asked on cross-examination.

As already noted, there were two survey plats prepared before the closing of the sale: the plat dated August 5, 1996 and the plat dated August 27, 1996. The only difference between the two is that the description of the disputed tract of land was changed in the later plat from "Tract 5" to "Hagaman." This difference is not insignificant; a tract of land with the seller's name on it is far more suggestive of the operative and essential fact in this case, that Mr. Hagaman intended to retain that particular tract. Mr. Henegar testified that he had a copy of the August 27, 1996 plat, but when asked if he ever showed it to Mr. or Mrs. McRae before the closing, he stated, "well, we saw it but I didn't really show it to them." It is undisputed that the McRaes did not see the plat labeling Tract 5 as "Hagaman" prior to the closing.

Based on the foregoing, we find that the trial court did not err in holding that Mr. Henegar neglected his duty to use reasonable care in determining that all the representations he made to the McRaes were true. The evidence does not preponderate against the trial court's conclusion that the McRaes justifiably relied on the statements of Mr. Henegar, a real estate professional, that the disputed Tract 5 was included in the sale. Bearing in mind the presumption of correctness that attaches to the trial court's assessment of relative fault, we hold the evidence does not preponderate against the trial court's finding that Mr. Henegar was 75% at fault for the damages suffered by the McRaes.

V. Conclusion

The judgment of the trial court finding Mr. Henegar 75% at fault and Mr. McRae 25% at fault is affirmed. Costs on appeal are assessed to the Appellant, W. Howard Henegar.

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SHARON G. LEE, JUDGE